**SIEW KAM WENG**

**v.**

**PUBLIC PROSECUTOR**

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. AZMI SCJ
AJAIB SINGH SCJ
[CRIMINAL APPEAL NO. 14 OF 1988]
16 SEPTEMBER 1989

***CRIMINAL PROCEDURE:*** *Section 302 of the Penal Code - Found guilty of culpable homicide - Trial Judge unable to concur with majority verdict - Retrial ordered - Fresh jury - Appellant filed notice of appeal.*

The appellant was tried before a jury of 7 persons who found him guilty of a lesser offence of culpable homicide not amounting to murder by a majority of 5 to 2. The trial Judge was unable to concur with the majority verdict and ordered the appellant to be retried before another jury pursuant to s. 231(b) of the Criminal Procedure Code. The appellant filed a notice of appeal against the said order, and we dismissed the appeal on 14 August 1989.

The crucial issue in this appeal was whether once a Judge in a criminal trial had decided to discharge a jury and ordered a retrial before another jury, there was any way in which that decision could be challenged.

**Held:**

**[1]** The making of a retrial order is based on statutory requirement and not merely on the exercise of judicial discretion.

**[2]** In light of the statutory provision clearly expressed in s. 231(b) of the Criminal Procedure Code, the Court ruled that in a jury trial under the Criminal Procedure Code, when the trial Judge did not concur with a majority verdict of guilty for whatever offence returned by the jury, the Judge had no alternative but to discharge the jury and order the accused to be retried before another jury.

**[3]** Whenever the final verdict of the jury is a deadlock, and in those circumstances the jury may be discharged and a retrial ordered in accordance with ss. 234 and 235 of the Criminal Procedure Code.

**[4]** A majority verdict even though by 6 to 1 or 5 to 2 is not a verdict in law unless and until the trial Judge concurs with it. If he does not concur, s. 231(b) comes into operation and the accused must be retried before another jury, for the simple reason that there is a deadlock between the majority of the jury and the Judge, and as such there is no verdict in law.

**[5]** When the jury found the appellant guilty of the lesser offence by majority of 5 to 2, there was at that juncture no verdict in law which the learned Judge must accept. The fact that in his summing up to the jury, the trial Judge had referred to their duty to consider a verdict of guilty of lesser offences other than murder, did not deprive him of the statutory option. In a murder trial, it is essential for the trial Judge to direct the jury on the possibility of returning a verdict of guilty of lesser offence where the evidence of the prosecution or defence so warrants.

**[6]** The fact that he had properly directed the jury on offences lesser than murder as warranted by evidence adduced by the defence, cannot be used in argument as a basis for saying that he had exercised his option wrongly under s. 231.

**[7]** The duty of the trial Judge under s. 223 of the Criminal Procedure Code in summing up the evidence and laying down the law by which the jury are to be guided has nothing to do with his duty and option under s. 231 if the guilty verdict of the jury is not unanimous.

**Cases referred to:**
*Windsor v. The Queen [1866] LR 1QB 289*
*R. v. Newton 13 QB 716*
*R. v. Lewis [1909] 2 Cr App R 180*
*R. v. Home Office Ex p. Graham (DC) [1983] 1 WLR 1281*
*R. v. Beadell [1933] 24 Cr App R. 39*
*R. v. Randall [1960] Crim LR 435*
*R. v. Gorman (CA) [1987] 1 WLR 545*
*Ramlan bin Salleh v. PP [1987] 2 MLJ 709; [1987] CLJ (Rep) 314*

**Legislation referred to:**
Criminal Procedure Code, ss. 204(i), (ii), 223, 224(i), 225, 228(i), (ii), 229, 230, 231(a), 231(b), 234, 235
Penal Code, s. 302

*For the appellant - Ajmeer Singh Sandhu; M/s. Ajmeer Singh Sandhu & Co.*
*For the respondent - Stanley Isaacs, DPP; Peguam Negara Malaysia*

**JUDGMENT**

**Mohd. Azmi SCJ:**

The appellant was tried in the Penang High Court on 9 November 1987 for the murder of an 11-year old girl, an offence under s. 302 of the Penal Code. It was the case for the prosecution that the girl had been sexually assaulted before she was strangled to death and her body dumped in a manhole. The appellant was tried before a jury of 7 persons who found him guilty of a lesser offence of culpable homicide not amounting to murder by a majority of 5 to 2. The trial Judge was unable to concur with the majority verdict and ordered the appellant to be retried before another jury pursuant to s. 231(b) of the Criminal Procedure Code. The appellant filed a notice of appeal against the said order, and we dismissed the appeal on 14 August 1989.

At the commencement of the hearing, we had referred both Counsels to the unusual nature of this appeal in that notwithstanding the absence of a conviction or sentence, an appeal had been filed "against the said decision of retrial and rejection of the verdict of the jury". It caused us to recall the statement of Lord Blackburn J in *Windsor v. The Queen* [1866] LR 1 QB 289 at p. 301 quoting Lord Denman CJ in *R. v. Newton* 13 QB 716:

> The discharge of the jury is neither an acquittal nor a conviction - there is no judgment ...

It was quite obvious even if the learned Counsel for the appellant had not informed us that the appellant was quite happy with the verdict returned by the majority of the jury and was aggrieved by the order of retrial made by the learned Judge. On the other hand, the learned DPP made a revelation from the Bar that the public prosecutor had in fact applied by motion to have this appeal struck out but the application had been dismissed summarily by this Court some time last year before another corum. In the absence of an oral or written judgment, we hoped we would be forgiven for giving ourselves the liberty to decide on whatever issues

we deemed necessary in this appeal without being inhibited by the dismissal of the public prosecutor's motion.

In the course of his 46-page summing up to the jury, the learned Judge had said at p. 281:

> Substantially speaking, the prosecution has conducted its case on the basis of murder or nothing.

Further down the same page, in dealing with the defence of alibi, he again said:

> Therefore, the question for your determination would appear to be a straightforward one of guilty of murder or not all.

But, at p. 282, he went on to say:

> The law is clear that if the circumstances open up the possibility of a verdict of culpable homicide not amounting to murder or causing death by a rash act, then it is your duty to consider bringing in such lesser verdicts even though you may reject the defence of alibi raised by the accused in his unsworn statement from the dock.

When dealing with the accused's confession at p. 307, the learned Judge reminded the jury:

> Accordingly, you are perfectly properly entitled to find the accused guilty of any of the three offences I have earlier mentioned, namely, murder, culpable homicide not amounting to murder or causing death by a rash act on the basis of the confession alone, so long as you believe it to be true.

Then, at p. 315, he continued:

> Well gentlemen, I have reviewed the evidence for the prosecution. Now, if after the conclusion of the evidence for the prosecution you consider the case to be one in which you cannot safely convict of murder, culpable homicide not amounting to murder, or causing death by a rash act, then you may return a verdict of not guilty.

Finally, at p. 321 after reviewing the defence, the learned Judge tabulated the four possible verdicts opened to the jury for their consideration, viz.:

(a) a verdict of not guilty - which means the accused will walk out of the dock a free man;

(b) not guilty of murder but guilty of culpable homicide not amounting to murder in contravention of s. 304 of the Penal Code;

(c) not guilty of murder but guilty of causing death by a rash act in contravention of s. 304A of the Penal Code;

(d) guilty of murder.

The main ground of appeal in the petition was that having directed the jury on the four possible verdicts, the learned trial Judge had no alternative but to accept and concur with the majority verdict.

We would now refer to the relevant provisions of the Criminal Procedure Code:

Section 204 (i) The jury shall consist of seven persons.

(ii) The verdict returned shall be unanimous or by a majority of not less than five to two.

Section 228 (i) If the jury are not unanimous, the Judge may require them to retire for further consideration.

(ii) After such period as the Judge considers reasonable, the jury may deliver their verdict although they are not unanimous.

Section 229 If the verdict is not guilty either unanimously or by a majority the Judge shall record judgment of acquittal.

Section 230 If the verdict is guilty unanimously judgment shall be entered accordingly and the Judge shall proceed to pass sentence on the convicted person according to law either then or at a later time during the same trial.

Section 231 If the verdict is guilty by a majority:

(a) if the Court concurs in such verdict judgment shall be entered accordingly and the Judge shall proceed to pass sentence as prescribed in s. 230;

(b) if the Court does not concur in such verdict the accused person shall be tried again before another jury.

The crucial issue in this appeal was whether once a Judge in a criminal trial had decided to discharge a jury and ordered a retrial before another jury, there was any way in which that decision could be challenged. This particular issue had long been settled in England. In *R. v. Lewis* [1909] 2 Cr App R 180 Channell J said at p. 181:

> The established law to the effect that the discharging of the jury is in the discretion of the Judge, and that his exercise of the discretion is not subject to review, is not affected by the Criminal Appeal Act 1907, and therefore we have no jurisdiction to deal with it.

The above statement of Channell J was quoted with approval by Robert Goff LJ in *R. v. Home Office Exp. Graham (DC)* [1983] 1 WLR 1281, where His Lordship held at p. 1287:

> It has long been the law that an appellate Court ... had no power to review the exercise of discretion of a Judge at a criminal trial to discharge the jury and order a retrial.

The principle that the Court of Criminal Appeal has no jurisdiction to interfere with a trial Judge's exercise of its discretion in the discharge of a jury was restated in *R. v. Beadell* [1933] 24 Cr. App. R. 39 and in *R. v. Randall* [1960] Crim LR 435.

More recently in *R. v. Gorman (CA)* [1987] 1 WLR 545, it was held that decision of a trial Judge to discharge the deadlock jury who had voted 9 to 3 in favour of an acquittal was not open to review by an appellate Court.

In our opinion, the English principle that an appellate Court has no jurisdiction to review the trial Judge's exercise of discretion to order the accused to be tried again before another jury is founded on even stronger ground in this country when such order is made as a result of the exercise of option by the trial Judge not to concur with the majority verdict of guilty under s. 231(b) of the Criminal Procedure Code. Here, unlike in England, the making of the retrial order is based on statutory requirement and not merely on the exercise of judicial discretion.

In the light of the statutory provision clearly expressed in s. 231(b), we therefore ruled that in a jury trial under the Criminal Procedure Code, when the trial Judge did not concur with a majority verdict of guilty for whatever offence returned by the jury, the judge had no alternative but to discharge the jury and order the accused to be retried before another jury.

As regards the other part of the appeal against the refusal of the learned Judge to concur with the majority verdict, it should be borne in mind that unlike in some other jurisdictions where the jury must be unanimous, our s. 228(ii) read with s. 204 of the Criminal Procedure

Code permits the jury to "deliver their verdicts although they are not unanimous" provided the verdict is by majority of 6 to 1, or 5 to 2. Anything less than 5 to 2 is not therefore a verdict in law. Thus, whenever the final verdict of the jury is one not recognised by law there is a deadlock, and in those circumstances the jury may be discharged and a retrial ordered in accordance with ss. 234 and 235 of the Criminal Procedure Code.

Where the verdict returned by the jury is by majority, there is a vital distinction between 'guilty' and 'not guilty' verdict. If the verdict is 'not guilty' by the majority of 6 to 1 or 5 to 2, the verdict is recognised by law, and by virtue of s. 229 of the Criminal Procedure Code it is clear that the trial Judge must record an 'acquittal' except perhaps where the verdict is clearly and utterly perversed. Thus for the validity of a 'not guilty' verdict, it does not matter whether the jury decides unanimously or by majority so long as the majority is not less than 5 to 2.

On the other hand, where the verdict is 'guilty' of whatever offence, the law makes a vital distinction between a unanimous and a majority verdict. If the guilty verdict is unanimous, the trial Judge is obliged under s. 230 to accept the plea and proceed to pass sentence. But if the guilty verdict is by majority of not less than 5 to 2, the law requires the trial Judge under s. 231 either to give or withhold his concurrence to such a verdict. In short, such a majority verdict even though by 6 to 1 or 5 to 2 is not a verdict in law unless and until the trial Judge concurs with it. If he does not concur, s. 231(b) comes into operation and the accused must be retried before another jury, for the simple reason that there is a deadlock between the majority of the jury and the Judge, and as such there is no verdict in law.

The concurrence required be s. 231 of the Criminal Procedure Code is a unique provision because it purports to encroach into the province of ss. 224(i) and 225 which lay down the rule that the Judge determines all questions of law whilst the jury determine all questions of fact. Under s. 231, the trial Judge can be said to be performing the duty of a Judge of facts taking over as it were the function of an additional juror so that when he votes with the majority decision, the verdict of the jury though not unanimous is recognised as a verdict in law, but if he votes against it the verdict becomes abortive. Accordingly, the refusal to give concurrence cannot in our opinion be subject to review in the same way that how a juror votes is not subject to appeal. As stated earlier, when a trial Judge does not concur with a majority guilty verdict, the deadlock remains and in the absence of an effective verdict, such deadlock jury must be discharged in accordance with the principle laid down in *R. v. Gorman*, and under the provision of s. 231(b) the accused is required by law to be retried before another jury.

The argument of the appellant that the learned trial Judge had no alternative but to accept and concur with the majority verdict must accordingly fail. When the jury found the appellant guilty of the lesser offence by majority of 5 to 2, there was at that juncture no verdict in law which the learned Judge must accept. The fact that in his summing up to the jury, the trial Judge had referred to their duty to consider a verdict of guilty of lesser offences other than murder, did not deprive him of the statutory option. In a murder trial, it is essential for the trial Judge to direct the jury on the possibility of returning a verdict of guilty of lesser offence where the evidence of the prosecution or defence so warrants - see *Ramlan bin Salleh v. PP* [1987] 2 MLJ 709/[1987] CLJ (Rep) 314. The fact that he had properly directed the jury on offences lesser than murder as warranted by evidence adduced by the defence, cannot be used in argument as a basis for saying that he had exercised his option wrongly under

s. 231. The duty of the trial Judge under s. 223 of the Criminal Procedure Code in summing up the evidence and laying down the law by which the jury are to be guided has nothing to do with his duty and option under s. 231 if the guilty verdict of the jury is not unanimous.

The appeal was accordingly dismissed and since the alleged offence was committed some years ago, we also ordered that an early date be fixed for the retrial of the appellant.

Also found at [1990] 1 CLJ 1